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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 696

ANONYMOUS (No. 1),

Petitioner,

versus

HON. WALTER R. HART, a Justice of the Supreme Court of the State of New York; HON. GEORGE A. ARKWRIGHT, a Justice of the Supreme Court of the State of New York, and DENIS M. HURLEY, counsel for the Judicial Inquiry,

Respondents.

PETITIONER'S REPLY BRIEF

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Brooklyn, New York

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Petitioner respectfully calls attention to the significant fact that the true respondent, Honorable Walter R. Hart, a Justice of the Supreme Court of the State of New York, has not opposed petitioner's application.

The intervening respondents, Hon. George A. Arkwright and Denis M. Hurley, counsel for the Judicial Inquiry, misconstrue the nature of petitioner's application.

The petitioner does not seek to review an order denying a motion to quash a subpoena duces tecum.

Instead he seeks to review an order of the Appellate Division of the Supreme Court dismissing on the merits petitioner's application under Article 78, Civil Practice Act, for an order directing a justice of the Supreme Court to decide a motion regularly and properly pending before him.

By Section 1300, Civil Practice Act, such an order is a final order which finally determines the rights of the parties. The said section provides:

> "FINAL ORDER. The court shall render a final order granting the petitioner the relief to which it deems he is entitled, or dismissing the proceeding, either on the merits or with leave to renew. * * *"

Here the proceeding was dismissed on the merits. Consequently *Cobbledick* v. *United States,* 309 U. S. 323, and *Alexander* v. *United States,* 201 U. S. 117, are inapplicable.

Petitioner's position is similar to that of the petitioner in *Perlman* v. *U. S.,* 247 U. S. 7. The only remedy available to the petitioner to "avert the mischief" of the Appellate Division's order dismissing the Article 78 proceeding is an appeal to this Court.

It is argued, on page 14 of the brief of the intervening respondents, that petitioner's contention that Mr. Justice Arkwright was appointed investigator and prosecutor to conduct the Judicial Inquiry, is based upon a misconception of the law and facts.

We submit that the order directing the Judicial Inquiry is a complete answer to this argument.

The order (Exhibit A) annexed to the Appellate Division papers, provides:

> "ORDERED, *that such inquiry and investigation shall be conducted by the Honorable George A. Arkwright,* a Justice of the Supreme Court, at a Special Term of the Supreme Court, County of Kings, with full power to compel attendance of witnesses, their testimony under oath and the production of all relevant books, papers and records; * * *"

Also:

> "ORDERED, that Denis M. Hurley, Esq., an attorney and counselor-at-law, of 32 Court Street, Brooklyn, New York, who has been duly designated by the Brooklyn Bar Association, be and he hereby is designated *to aid the said Justice in the conduct of said inquiry and in the prosecution of said investigation,* pursuant to the provisions of the Judiciary Law (Section 90, subdivisions 6 and 7), * * *."

The foregoing provisions of the Appellate Division order are a clear demonstration that the Justice conducting the Judicial Inquiry is a "prosecutor" within the accepted meaning of the word.

Intervening respondents also misconstrue petitioner's contention that, to relegate him to the Additional Special Term for the determination of his application to quash the subpoena duces tecum would deprive him of the equal protection of the law.

Normally an application to quash a subpoena duces tecum results in a final order which is appealable.

However, as was pointed out, on page 15 of petitioner's main brief, the Appellate Division has specifically held that such an order if made by the Additional Special Term would not be appealable. In *Matter of C Anonymous,* Oct. 7, 1958, it was said by the Appellate Division, Second Department:

> "* * *. The Judicial investigation in which the order was made is neither an action, civil or criminal, nor a special proceeding (cf. People ex rel. Karlin v. Culkin, 248 N. Y. 465; Matter of Brooklyn Bar Ass'n., 223 App. Div. 149, 151). In the absence of statutory authority, the order is not appealable. * * *."

Therefore no appeal would lie from an order of the Additional Special Term deciding the application. Clearly such a result would violate petitioner's constitutional rights.

Dated: March 16th, 1959.

Respectfully submitted,

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